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No. 15-474

In The
Supreme Court of the United States

ROBERT F. MCDONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether "official action" is limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power, and whether the jury must be so instructed; or, if not so limited, whether the Hobbs Act and honest services fraud statute are unconstitutional?

2. Whether a trial court must ask potential jurors who admit exposure to pretrial publicity whether they have formed opinions about the defendant's guilt based on that exposure and allow or conduct sufficient questioning to uncover bias, or whether courts may instead rely on those jurors' collective expression that they can be fair?

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and an affiliate membership of more than 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in the Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties received notice of NACDL's intention to file this amicus brief ten days before the due date. Both parties have lodged blanket consents to the filing of amicus briefs with the Clerk of the Court under Rule 37.2(a).

NACDL works to resist overcriminalization--the steady expansion of federal crimes, through new criminal statutes and broad interpretations of existing statutes by the executive and judicial branches.[2] The bribery charges in this case--alleged as honest services and Hobbs Act violations--implicate two of the core problems of overcriminalization: the federalizing of crimes traditionally reserved for state jurisdiction, and the ambiguous criminalization of conduct without meaningful definition or limitation. NACDL's views on the first question presented will assist the Court in deciding whether the district court's instruction on the "official act" element impermissibly broadened the scope of the statutes at issue.

The second question goes to the heart of the Sixth Amendment guarantee of an impartial jury. Because the court of appeals' ruling on the scope and nature of voir dire represents a dangerous departure from this Court's decisions protecting that right, NACDL urges review.

NACDL's Amicus Curiae Committee requested and authorized undersigned counsel to file this brief.

ARGUMENT

The Court should grant the writ on both questions presented. First, the district court's unbounded interpretation of the "official act" element conflicts with at least three fundamental principles that constrain the scope of federal criminal statutes:

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[2] For a description of NACDL's efforts to reduce overcriminalization, see https://www.nacdl.org/overcrim/.

(1) that, absent a clear statement from Congress, a federal criminal statute should not be interpreted to alter the federal-state balance in prosecuting crime; (2) that, under the rule of lenity, ambiguities in criminal statutes must be resolved against the prosecution; and (3) that statutes should be interpreted, to the extent possible, to avoid grave constitutional questions--here, the potential vagueness of the Hobbs Act and 18 U.S.C. § 1346. Under these principles, the district court's "official act" instruction represents an impermissibly broad reading of these statutes. The Court should grant the writ to reinforce the limited scope of federal criminal law.

Second, in this publicity-drenched case, the court of appeals' approval of perfunctory, collective voir dire that omitted the key question--whether the jurors "had such fixed opinions that they could not judge impartially the guilt of the defendant," *Patton v. Yount*, 467 U.S. 1025, 1035 (1984)--conflicts with this Court's decisions and the rulings of seven other Circuits and violates the Sixth Amendment right to an impartial jury. The Court should grant the writ on this question as well.

I. THE COURT SHOULD GRANT THE WRIT TO REINFORCE KEY PRINCIPLES THAT RESTRAIN EXPANSIVE INTERPRETATIONS OF BROADLY WORDED FEDERAL CRIMINAL STATUTES.

The Court should grant the writ to reinforce the "clear statement" principle, the rule of lenity, and

the doctrine of constitutional avoidance, all of which restrain expansive interpretations of broadly worded federal criminal statutes.

A. The "Clear Statement" Rule.

The Commonwealth of Virginia, through its elected representatives, has established a comprehensive statutory scheme regulating gifts to state officials. Va. Code Ann. § 2.2-3101 et seq. Violations of some provisions of the statute constitute state misdemeanors; other violations are punishable solely through noncriminal means, including loss of office, civil penalties, and forfeiture. Here, there was no contention that Mr. McDonnell violated any of these state provisions; as the district court instructed the jury, "[t]here has been no suggestion in this case that Mr. McDonnell violated Virginia law." XXVI T. 6125. This federal prosecution thus marks an extraordinary intrusion by federal prosecutors into an area of traditional state regulation. As this Court has held, federal prosecutors may usurp state jurisdiction in this manner only where Congress clearly authorizes it. No such clear authority exists here.

1. This Court has repeatedly recognized that use of broadly worded federal crimes to prosecute matters traditionally regulated by the states raises federalism concerns. *See, e.g., Bond v. United States*, 134 S. Ct. 2077, 2091 (2014) (declining to read 18 U.S.C. § 229 broadly to "alter sensitive federal-state relationships") (quotation omitted); *Cleveland v. United States*, 531 U.S. 12, 24 (2000) (declining to extend the mail fraud statute to "a wide range of conduct traditionally regulated by state and local

authorities"); *Jones v. United States*, 529 U.S. 848, 858 (2000) (same; interpreting federal arson statute); *Williams v. United States*, 458 U.S. 279, 290 (1982) (construing statute narrowly in part because the case involved "a subject matter that traditionally has been regulated by state law"); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (construing 18 U.S.C. § 1952 and rejecting a broad interpretation where it "would alter sensitive federal-state relationships").

Federal-state tension becomes particularly acute when federal prosecutors turn broadly worded federal statutes against local elected officials. As the en banc Fifth Circuit observed in interpreting the honest services statute: "We find nothing to suggest that Congress was attempting in § 1346 to garner to the federal government the right to impose upon states a federal vision of appropriate services--to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure." *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (en banc); *see, e.g., McNally v. United States*, 483 U.S. 350, 360 (1987) (declining to read mail fraud statute in a way that would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials"); *United States v. Panarella*, 277 F.3d 678, 693 (3d Cir. 2002) (same).

To address these federalism concerns, this Court has held that, absent a clear statement of Congressional intent, the federal government may not intrude into areas of criminal law enforcement traditionally left to the states. *See, e.g., Bond*, 134 S.

Ct. at 2088 ("The problem with this interpretation is that it would dramatically intrude upon traditional state criminal jurisdiction, and we avoid reading statutes to have such reach in the absence of a clear indication that they do.") (quotation and brackets omitted); *Cleveland*, 531 U.S. at 25 ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." (quotation omitted)); *Jones*, 529 U.S. at 858 (same); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

2. The "clear statement" principle applies with particular force here, because this federal prosecution intrudes directly into an intricate and carefully calibrated system of state regulation. *See, e.g., United States v. Ratcliff*, 488 F.3d 639, 648-49 (5th Cir. 2007) (rejecting application of mail fraud statute to local election fraud in part because "Louisiana law establishes a comprehensive regulatory system governing campaign contributions and finance disclosures for state and local elections, with state civil and criminal penalties in place for making misrepresentations on campaign finance disclosure reports").

In 1987, a special session of the Virginia General Assembly enacted the State and Local Government Conflict of Interests Act, Va. Code Ann. § 2.2-3101 et seq. ("the Act"). Section 2.2-3103--titled "Prohibited conduct"--forms the heart of the Act. That section contains a series of carefully drawn

prohibitions applicable to any "officer or employee of a state or local governmental or advisory agency," including the Governor. Knowing violations of some categories of prohibited conduct constitute state misdemeanors. Va. Code Ann. § 2.2-3120. For other categories of conduct--which, in *Brumley*'s words, address only "appearances of corruption," 116 F.3d at 734--the statute declares that "[v]iolations shall not be subject to criminal law penalties." Va. Code Ann. § 2.2-3103(8), (9).

In addition to the prohibitions in § 2.2-3103, the Act requires public officials--including the Governor--to make annual, detailed disclosures of certain "personal and financial interests," including gifts from third parties to the official, his spouse, or other immediate family members. Va. Code Ann. §§ 2.2-3113, -3114, -3117. Knowing violations of the disclosure requirements constitute misdemeanors. *Id.* § 2.2-3120.

The Act assigns a crucial role to the Virginia Attorney General. First, the Attorney General provides advisory opinions on the application of the Act to state officers or employees who request them. *Id.* § 2.2-3126(A)(3). Second, the Attorney General has the power to investigate potential violations of the Act that come to his attention. *Id.* § 2.2-3126(A)(1). Finally, and critically, the Act provides that if the Attorney General "determines that there is a reasonable basis to conclude that any officer or employee serving at the state level of government has knowingly violated any provision of this chapter, he shall designate an attorney for the Commonwealth who shall have complete and independent discretion

in the prosecution of such officer or employee." *Id.* § 2.2-3126(A)(2). The low threshold ("reasonable basis to conclude") for the Attorney General's designation of a Commonwealth Attorney to prosecute, and the "complete and independent discretion" of the Commonwealth Attorney once designated, ensure that partisan political considerations play as small a role as possible in the Act's enforcement.

The investigative and enforcement process established in the Act worked as intended here until the federal prosecution intervened. Then-Attorney General Ken Cuccinelli designated Commonwealth Attorney Michael Herring (a Democrat) to investigate potential state charges against the McDonnells. Mr. Herring investigated the allegations and would have made an independent charging decision but for the federal interference that this case represents. That charging decision may well have been favorable to Mr. McDonnell; as the district court instructed the jury, "[t]here has been no suggestion in this case that Mr. McDonnell violated Virginia law," XXVI T. 6125, including the Act. But there is no way to know for sure, because Mr. Herring ended his investigation once federal charges were brought.[3] Although the federal courts "have traditionally viewed the exercise of state officials' prosecutorial discretion as a valuable feature of our constitutional system," *Bond*, 134 S. Ct. at 2092, the federal prosecutors here chose to preempt that discretion. They chose, in other words, to "displace[] the public policy of the Commonwealth of

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[3] *See* Rosalind S. Helderman, *State To Drop Investigation of McDonnell Without Charges*, The Washington Post (Jan. 27, 2014).

[Virginia], enacted in its capacity as sovereign." *Id.* at 2093 (quotation omitted).[4]

3. The obvious clash between this federal prosecution and the Act's "comprehensive regulatory system" warrants careful adherence to the "clear statement" principle in determining whether the Hobbs Act and the honest services statute sweep as broadly as the Fourth Circuit found. *Ratcliff*, 488 F.3d at 648-49. Under that principle, the district court's "official act" instruction impermissibly expanded the statutes' scope. The instruction permitted the jury to convict Mr. McDonnell for accepting gifts from Mr. Williams in exchange for attending events and arranging access to other public officials. Congress has made no statement at all that such conduct involves "official acts," much less the "clear statement" that this Court requires. Under federal law, an "official act" requires a decision or other action on a pending governmental matter. The mere attending of events or arranging of access, without either taking action on a pending governmental matter or pressuring someone else to take action, does not meet that standard.

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[4] Despite the district court's instruction that there was no suggestion Mr. McDonnell had violated Virginia law, the government introduced his state disclosure forms into evidence over objection, cross-examined him and other witnesses about them, and suggested in closing argument that he had completed them improperly to hide his relationship with Mr. Williams. The district court compounded the harm from this evidence by excluding defense expert testimony that would have explained the forms. Thus, this federal prosecution not only invaded an area traditionally regulated by the state; it also used Mr. McDonnell's compliance with state law requirements misleadingly as evidence that he had violated federal law.

B. The Rule of Lenity.

Federalism concerns are reason enough to construe narrowly the "official act" element of the corruption charges. But there is a second, equally fundamental reason: the rule of lenity.

Under the rule of lenity, "when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359-60; *see, e.g.*, *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion) (same); *Skilling v. United States*, 561 U.S. 358, 410-11 (2010) (applying rule of lenity to honest services statute); *Scheidler v. NOW*, 537 U.S. 393, 409 (2003) (applying rule of lenity to Hobbs Act).

In a case such as this, where the government advances an expansive interpretation of federal criminal statutes against a state official in an area covered by comprehensive state regulation, the "fair warning" principle that underlies the rule of lenity is especially critical. A state official might readily believe that state law fully defines his ethical obligations as an officeholder. It is unlikely that any state official, having concluded that his conduct is lawful under state law (as Mr. McDonnell's conduct indisputably was), would go on to consider whether that conduct might nonetheless violate the Hobbs Act or the honest services statute and thus subject him to a felony conviction and a substantial prison term. If these statutes are to displace state law, fairness demands that courts permit them to do so only when

the state officeholder's conduct falls unambiguously within their scope.

The "official act" element of the Hobbs Act and the honest services statute does not encompass Mr. McDonnell's conduct (attending events and arranging access to other public officials) at all, much less unambiguously so. Under the rule of lenity, therefore, the district court's instruction permitting conviction for that conduct was erroneous.

C. Constitutional Avoidance.

This Court "avoid[s] constitutional difficulties by adopting a limiting interpretation [of a statute] if such a construction is fairly possible." *Skilling*, 561 U.S. at 406 (bracketed language added; brackets and quotation omitted). If "official act" is given the sweeping interpretation that the government urged and the court of appeals adopted, the difficult question will arise whether the Hobbs Act and the honest services statute are void for vagueness, at least in the context of payments for political access. *See, e.g., Johnson v. United States*, 135 S. Ct. 2551 (2015) (residual clause in ACCA definition of "violent felony" found unconstitutionally vague); *Skilling*, 561 U.S. at 415-24 (Scalia, J., concurring in the judgment) (contending that the honest services statute is void for vagueness and cannot be saved through a limiting construction). The Court can avoid this "constitutional difficult[y]" by interpreting "official act" to require exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power.

II. THE COURT SHOULD GRANT THE WRIT TO PROTECT THE SIXTH AMENDMENT RIGHT TO AN UNBIASED JURY.

The court of appeals' approval of collective voir dire that omitted the key question--whether the potential jurors "had such fixed opinions that they could not judge impartially the guilt of the defendant," *Patton*, 467 U.S. at 1035--conflicts with this Court's decisions and the rulings of other Circuits. The truncated voir dire, in the face of pervasive and relentlessly hostile publicity, violates the Sixth Amendment right to an impartial jury. The Court should grant the writ on this question as well.

This Court has often expressed skepticism about jurors' assurances of impartiality in the face of vitriolic publicity. The Court has recognized that, in extreme cases, even jurors' sincere assertions that they can put aside their feelings and beliefs and perform their duty fairly "should not be believed." *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991) (quotation omitted); *see, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963). As the Court noted, "No doubt each juror was sincere when he said he would be fair and impartial but the psychological impact of requiring such a declaration before one's peers is often its father." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

The publicity in this case may not have been so extreme that potential jurors' assurances of impartiality had to be rejected out of hand--but the

jurors should at least have been subjected to probing voir dire on that point. Instead, the district court merely asked the potential jurors en masse to stand "if you have read, heard or seen something in the media [about the case]" and then to sit if they could "put aside whatever it is that you've heard, listen to the evidence in this case and be fair to both sides." Pet. App. 160a.

The court of appeals' decision affirming the district court's perfunctory voir dire is particularly indefensible in light of this Court's analysis in *Skilling*. That case, like this one, featured a staple of modern criminal law--intense, pervasive, uniformly hostile, and often inaccurate media coverage that saturated the community from which the jurors were drawn. Skilling maintained that in such circumstances, the Sixth Amendment required a change of venue, because jurors' assurances of impartiality could not be trusted. This Court rejected that contention and found no constitutional violation, because the trial judge (a) submitted a questionnaire that included the question, among others, "Based on anything you have heard, read, or been told, do you have any opinion about the guilt or innocence of Jeffrey Skilling," with a request to explain an affirmative answer, 561 U.S. at 371 n.4 (brackets and ellipses omitted), (b) conducted individual voir dire, *see id.* at 373-74, and (c) permitted counsel to ask follow-up questions to the jurors during the individual, sequestered voir dire, *see id.* at 374. Through this careful process, the trial judge could assess the prospective jurors' "inflection, sincerity, demeanor, candor, body language, and apprehension of duty" and make individualized findings on possible

bias. *Id.* at 386. This Court concluded that the district court's findings based on these procedures deserved considerable deference. *See id.* at 386-87

Here, by contrast to *Skilling*, the district court rejected a jointly-proposed question for the jury questionnaire about whether prospective jurors had formed an opinion about the defendant's guilt. Pet. App. 29a. It refused to put any of the questions to the venire on that topic that the defense submitted. And the court rejected individual voir dire about the effects of the publicity. The district court thus had no evidence--no observations of "inflection, sincerity, demeanor, candor, body language, and apprehension of duty"--on which to make individualized findings concerning potential jurors' ability to disregard the hostile media reports and decide the case fairly on the evidence. Under these circumstances, the court of appeals had no basis for deferring to the district court's discretion. Pet. App. 28a.

Given the Fourth Circuit's disregard of *Skilling* and its predecessors, it is no surprise that petitioner has identified seven circuits with conflicting decisions. Pet. 34-35. That conflict in the circuits (not to mention the conflict with *Skilling*) is reason enough to grant the writ. It bears noting, however, that the state courts are also in conflict, with a majority favoring individual voir dire in cases involving extensive pretrial publicity.[5]

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[5] *See, e.g., Brown v. State*, 601 P.2d 221, 231 (Alaska 1979) (defendant must be allowed "searching inquiry" where potential juror may have been exposed to "prejudicial publicity"); *Hughes v. State*, 490 A.2d 1034, 1041-42 (Del. 1985) (finding "limited form of group voir dire" inadequate in light of "probable prejudice

This case presents an excellent vehicle for resolving these conflicts and making clear that *Skilling* and its predecessors mandate meaningful inquiry concerning the possible effect of prejudicial pretrial publicity. If the bedrock constitutional right to "indifferent" jurors[6] means anything--particularly in this era of around-the-clock news coverage, through traditional media and through new forms of journalism and "infotainment"--it required the district court to conduct probing, individual voir dire of potential jurors who had been exposed to the avalanche of negative publicity concerning Mr. McDonnell.

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on account of the pretrial publicity"); *Bolin v. State*, 736 So. 2d 1160, 1165 (Fla. 1999) ("preferred approach" is to conduct individual voir dire whenever the timing and content of pretrial publicity "creates the probability that prospective jurors have been exposed to prejudicial information that will not be admissible at trial"); *State v. Pokini*, 526 P.2d 94, 100 (Haw. 1974) ("perfunctory and generalized" voir dire questions insufficient in light of "quantity, quality, and timing" of pretrial publicity); *Morris v. Commonwealth*, 766 S.W.2d 58, 59-60 (Ky. 1989) ("When there has been extensive pre-trial publicity, great care must be exercised on voir dire examination to ascertain just what information a prospective juror has accumulated."); *People v. Jendrzejewski*, 566 N.W 2d 530, 537-38 (Mich. 1997) ("[W]here there is extensive pretrial publicity, jurors should be adequately questioned so that challenges for cause and peremptory challenges can be intelligently exercised."); *Commonwealth v. Johnson*, 269 A.2d 752, 757 (Pa. 1970) ("When there is present in a case inflammatory pretrial publicity which creates the possibility that a trial could be prejudiced, there are exactly those circumstances present which require each juror to be questioned out of the hearing of the other jurors."). *But see, e.g., Luong v. State*, 2014 Ala. LEXIS 39, at *23-*40 (Ala. Mar. 14, 2014) (upholding denial of individual voir dire in case involving extensive adverse publicity); *Carr v. State*, 655 So. 2d 824, 843 (Miss. 1995) (same); *State v. Martin*, 944 A.2d 867, 876 (Vt. 2007) (same).

[6] *Sheppard*, 384 U.S. at 362.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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